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OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION

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**MEMORANDUM**

TO: D.T.E. 03-50 Service List  
Consolidated Arbitrations Service List

FROM: Marcella Hickey, Hearing Officer

DATE: December 8, 2004

RE: Performance Assurance Plan, D.T.E. 03-50  
Request for Additional Comments re: Proposal to eliminate wholesale  
performance standards established in Consolidated Arbitrations,  
D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94, in favor of  
Performance Assurance Plan and Carrier-to-Carrier Guidelines

CC: Mary Cottrell, Secretary  
Andrew O. Kaplan, General Counsel  
Paula Foley, Assistant General Counsel  
Mike Isenberg, Director, Telecommunications Division  
Deborah Alexander, Analyst, Telecommunications Division

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I. INTRODUCTION

The Department of Telecommunications and Energy ("Department") requested comment on January 22, 2004, from Verizon New England Inc. d/b/a Verizon Massachusetts ("Verizon"), competitive local exchange carriers ("CLECs"), and other interested persons on the question of whether the Department should terminate Verizon's obligations under the

performance standards established in the Consolidated Arbitrations proceeding<sup>1</sup> in favor of the performance standards and remedies set forth in the Carrier-to-Carrier (“C2C”) Guidelines (effective January 2000) and the Performance Assurance Plan (“PAP”) (effective April 2001). Upon review of the comments received, the Department hereby seeks additional comment on the effect that elimination of the Consolidated Arbitrations performance standards would have on the interconnection agreements that incorporate those standards.

## II. BACKGROUND

The Department approved the first set of standards to measure Verizon’s wholesale performance in the Consolidated Arbitrations Phase 3-F Order (November 19, 1999) and ordered the parties to incorporate the determinations regarding performance standards and other arbitrated issues into their interconnection agreements, along with negotiated provisions.<sup>2</sup> See, e.g., Consolidated Arbitrations Phase 3 Order at 20-27, 53-54 (December 4, 1996); Phase 3-E Order at 35 (September 25, 1998). When the Department subsequently adopted the C2C Guidelines and PAP,<sup>3</sup> many CLECs were already receiving reports and payments pursuant to the Consolidated Arbitrations performance standards included in their interconnection agreements. Currently, there are CLECs receiving payments from both plans (though not cumulatively).<sup>4</sup>

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<sup>1</sup> Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94.

<sup>2</sup> As an example, the interconnection agreement between Verizon and AT&T Communications of New England, Inc. (“AT&T”) states that: “The Parties hereby agree that the performance standards and remedies approved by the Department in the Consolidated Arbitrations ... shall be incorporated by reference into this Agreement and shall govern the provision of services hereunder, as applicable.” AT&T Interconnection Agreement, ¶ 11.

<sup>3</sup> The Department adopted New York’s C2C Guidelines and the PAP as part of the Department’s investigation into Verizon’s application to provide long distance service. Verizon Application for Entry into the In-Region InterLATA Telephone Market, D.T.E. 99-271, Order Adopting Performance Assurance Plan (September 5, 2000); Order on Motions for Clarification and Reconsideration re: Performance Assurance Plan (November 21, 2000). Upon closure of D.T.E. 99-271, in order to receive ongoing PAP-related filings, the Department opened docket D.T.E. 03-50 on April 24, 2003.

<sup>4</sup> The D.T.E. 99-271 PAP Orders require Verizon to pay CLECs whose interconnection agreements incorporate the performance standards and credits of the Consolidated Arbitrations the higher of the Consolidated Arbitrations or the PAP credits. If any particular CLEC had chosen not to participate in the PAP, that CLEC would have

(continued...)

On January 22, 2004, the Department issued a Memorandum in this docket requesting comments on its proposal to eliminate the Consolidated Arbitrations performance standards. In its request for comments, noting that administering two performance plans may be an unnecessary burden for the Department, Verizon, and CLECs, the Department proposed to eliminate the Consolidated Arbitrations standards in favor of the C2C Guidelines and PAP because: the C2C Guidelines and PAP are more comprehensive; a larger and more diverse group of CLECs participated in development of the C2C Guidelines and the PAP, at a time when CLECs and Verizon had more experience with provisioning issues than they did in when the Consolidated Arbitrations plan was established; and the C2C Guidelines are subject to ongoing assessment and updating through the New York Carrier Working Group (“Carrier Working Group”), while the Consolidated Arbitrations standards are more static. Verizon and AT&T submitted initial comments on February 12, 2004 and reply comments on March 4, 2004.

### III. REQUEST FOR ADDITIONAL COMMENTS

The Department requests comment on the following additional issues related to its proposal to eliminate the Consolidated Arbitrations standards and maintain the PAP and C2C Guidelines as the sole set of standards to measure Verizon’s performance.

- (1) The Consolidated Arbitrations performance standards are incorporated by reference into numerous CLEC interconnection agreements. AT&T contends in its Initial Comments that the “right to Verizon performance remedies under the [interconnection agreements] constitutes a legally enforceable obligation of Verizon that cannot be modified by the independent and unilateral actions of third parties” (AT&T Comments at 2). Is the Department precluded from eliminating the Consolidated Arbitrations performance standards from interconnection agreements by a decision in this docket, or is the Department required to conduct an arbitration or engage in some other procedure for purposes of determining whether to eliminate the Consolidated Arbitrations performance standards from interconnection agreements? Please explain. Also please comment on the applicability of Pacific Bell v. Pac-West Telecom, Inc., 325 F.3d 1114 (9<sup>th</sup> Cir. 2003) (Ninth Circuit Court found that the California Public Utilities Commission did not have the authority to issue a generic rulemaking order applicable to all interconnection agreements), or any other relevant case law, to this question.

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<sup>4</sup>(...continued)

continued to receive credits under the Consolidated Arbitrations plan only; however, no CLEC declined to participate in the PAP.

- (2) If the Department has authority to eliminate the Consolidated Arbitrations performance standards from interconnection agreements by a decision in this docket, must the Department conduct an adjudicatory hearing, as AT&T contends in its Initial and Reply Comments? (AT&T Comments at 6, citing G.L. c. 30A, § 1(1)). If so, what would be the factual issues in dispute and type of evidence to be examined?
- (3) Procedurally, how would Verizon and CLECs implement a Department decision in this docket eliminating the Consolidated Arbitrations performance standards from their interconnection agreements? Would such a Department decision constitute a change of law requiring revision of these interconnection agreements pursuant to the agreements' change-of-law provisions? Please explain.

#### IV. FILING OF COMMENTS

The Department invites interested persons to file written comments no later than the close of business on Wednesday, January 19, 2005. Reply comments shall be filed by the close of business on Wednesday, February 2, 2005. One original and (3) three copies of initial and reply comments must be filed with:

Mary Cottrell, Secretary  
Department of Telecommunications and Energy  
One South Station, 2<sup>nd</sup> Floor  
Boston, MA 02110  
RE: Consolidated Arbitrations Performance Standards, D.T.E. 03-50

Please also submit all written comments to the Department in electronic format using one of the following methods: (1) by e-mail attachment to [dte.efiling@state.ma.us](mailto:dte.efiling@state.ma.us) and [marcie.hickey@state.ma.us](mailto:marcie.hickey@state.ma.us), or (2) on a 3.5" disk. The text of the e-mail or the disk label must specify: (1) the docket number of the proceeding (D.T.E. 03-50), (2) name of the person or company submitting the filing, and (3) a brief descriptive title of the document. The electronic filing also should include the name, title, and telephone number of a person to contact in the event of a question about the filing. Text responses should be created in either Corel WordPerfect, Microsoft Word, or an Adobe-compatible PDF file. Data or spreadsheet responses should be compatible with Microsoft Excel. All comments submitted in electronic format will be posted on the Department's Web site: <http://www.mass.gov/dte/>.